

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 92

Docket No. SF-0353-09-0549-B-1

**Phan V. Tram,
Appellant,**

v.

**United States Postal Service,
Agency.**

July 27, 2012

Juan Lamas, Pasadena, California, for the appellant.

Catherine V. Meek, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the remand initial decision that reversed its decision to deny the appellant restoration to duty after her partial recovery from a compensable injury. For the reasons set forth below, we GRANT the petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant is a Mail Processing Clerk for the agency. Initial Appeal File (IAF), Tab 1 at 1. The appellant suffered a compensable injury on July 13, 1998, and thereafter returned to work in a modified assignment. IAF, Tab 7 at

21, 59. On April 9, 2009, the agency issued the appellant a letter informing her that, pursuant to the National Reassessment Process (NRP), it had determined that there was no operationally necessary work available for her within her medical restrictions. *Id.* at 12. The letter directed the appellant to request leave and not to report again for duty unless she is informed that such work is available. *Id.*

¶3 The appellant filed a Board appeal of the agency's action. IAF, Tab 1 at 2. The administrative judge found that the appellant is entitled to the restoration appeal rights of a partially recovered employee. IAF, Tab 11 at 2. She notified the appellant of her burden of establishing jurisdiction over such an appeal, and the parties filed evidence and argument on the issue. IAF, Tab 2 at 3, Tabs 6-7, Tab 11 at 2-4, Tabs 14-19, 21. The appellant waived her right to a hearing. IAF, Tab 8.

¶4 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction on the basis that the appellant failed to make a nonfrivolous allegation that the denial of restoration was arbitrary and capricious. IAF, Tab 22 at 2, 8-12. The appellant filed a petition for review, and the Board issued an Opinion and Order reversing the initial decision and remanding the appeal for further adjudication. *Tram v. U.S. Postal Service*, [114 M.S.P.R. 413](#), ¶¶ 1, 10-11, 14 (2010).

¶5 After further development of the record on remand, the administrative judge issued a new initial decision reversing the denial of restoration. Remand File (RF), Tab 11, Remand Initial Decision (RID) at 2, 10. The administrative judge found that the agency had not searched throughout the local commuting area for appropriate work at the time that it discontinued the appellant's modified assignment. RID at 8-10. She found that, although the agency eventually completed its job search well after it discontinued the appellant's modified assignment and determined that there was no work available at that time, the April 9, 2009 denial of restoration was still arbitrary and capricious. RID at 9-10. The administrative judge ordered the agency to restore the appellant

retroactively to April 9, 2009, and to award her appropriate back pay and benefits. RID at 10-11.

¶6 The agency has filed a petition for review, arguing that the proper remedy in this case is not retroactive restoration but back pay covering the period for which restoration was improperly denied. Petition for Review (PFR) File, Tab 1 at 4-10. The appellant has not filed a response.

ANALYSIS

¶7 The purpose of a Board order canceling a wrongful action is to place the appellant as nearly as possible in the status quo ante, i.e., in the situation she would have been in had the action not occurred. *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984); *Bullock v. Department of the Air Force*, [80 M.S.P.R. 361](#), ¶ 5 (1998); see [5 U.S.C. § 1204](#)(a)(1), (2). In order to accomplish status quo ante relief, the Board will often be required to exercise broad remedial powers. *Lavelle v. Department of the Navy*, [40 M.S.P.R. 329](#), 331 (1989). The Board will consider the facts and circumstances of a particular case in deciding upon an appropriate remedy. Cf. [5 C.F.R. § 353.301](#)(d) (an agency must make every effort to restore a partially recovered individual within the local commuting area according to the circumstances of each case).

¶8 Under the particular circumstances of this case, we agree with the agency that retroactive restoration is not the appropriate status quo ante remedy. PFR File, Tab 1 at 8-10. A partially recovered individual does not enjoy an unconditional right to restoration. *Delalat v. Department of the Air Force*, [103 M.S.P.R. 448](#), ¶ 16 (2006); *Irlanda v. U.S. Postal Service*, [23 M.S.P.R. 289](#), 291-92 (1984); see [5 C.F.R. § 353.301](#)(a), (d). Rather, an agency's decision to deny restoration to a partially recovered individual constitutes a reviewable action only to the extent that it is "arbitrary and capricious." [5 C.F.R. § 353.304](#)(c); see *Zysk v. U.S. Postal Service*, [108 M.S.P.R. 520](#), ¶ 6 (2008); see also *Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1103-04 (Fed.

Cir. 2011). In this case, the appellant has not established that the agency should have retained her in her former modified assignment beyond April 9, 2009.

¶9 However, upon discontinuing the appellant's modified assignment, the agency was obligated to conduct a legally sufficient job search for an alternative assignment. *Sanchez v. U.S. Postal Service*, [114 M.S.P.R. 345](#), ¶ 14 (2010); *Urena v. U.S. Postal Service*, [113 M.S.P.R. 6](#), ¶ 13 (2009); [5 C.F.R. § 353.301](#)(d). The administrative judge found that the agency failed to conduct such a search in a timely manner and that the agency's action was arbitrary and capricious in that regard. RID at 9-10. The agency has not challenged the administrative judge's finding, which is supported by the record and the law.

¶10 The Board will not order the appellant restored to an assignment that was properly discontinued, nor will it order back pay based on such an assignment because that would put the appellant in a better position than if the wrongful action had not occurred. *Cf. Hagan v. Department of the Army*, [99 M.S.P.R. 313](#), ¶ 8 (2005) ("A status quo ante remedy does not require that the appellant be placed in a better position than he was in at the time of the agency's action."). Rather, in a case like this one where the denial of restoration was arbitrary and capricious for lack of a proper job search, the Board has found that the appropriate remedy is for "the agency to conduct an appropriate search within the local commuting area retroactive to . . . the date of the appellant's request for restoration, and to consider her for any suitable vacancies."¹ *Sapp v. U.S. Postal Service*, [82 M.S.P.R. 411](#), ¶ 21 (1999). The remedy of a retroactive job search will be sufficient to correct the wrongful action and substitute it with a correct one based on an appropriate search. However, it will not put the appellant in a better position than the one she was in before the wrongful action because it

¹ Under the circumstances of this case, we find it appropriate to treat the date that the agency discontinued the appellant's limited duty assignment as the date that she "requested" restoration within the meaning of *Sapp*.

leaves open the possibility that the agency might still be unable to find an appropriate assignment available as of April 9, 2009.² The appellant may be entitled to back pay only if the agency's retroactive job search uncovers available work to which it could have restored her. Therefore, this case is distinguishable from *Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶¶ 77, 83 (2012), where the Board ordered the agency to retroactively restore two appellants to their former modified assignments. In those situations, the Board found that the agency had acted arbitrarily and capriciously because the appellants established that the limited circumstances under which the agency could legitimately discontinue their modified assignments were not present. *Latham*, [117 M.S.P.R. 400](#), ¶¶ 42, 49.

ORDER

¶11 Accordingly, we ORDER the agency to conduct a proper job search retroactive to April 9, 2009, and to consider the appellant for any suitable assignments available during that time period consistent with its restoration obligations under [5 C.F.R. § 353.301](#)(d). The agency must complete this action no later than 30 days after the date of this decision.

¶12 In the event that the agency's retroactive job search uncovers available work to which it could have restored the appellant, we ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date on which it completes its

² We agree with the administrative judge that, even assuming that the agency's December 24, 2009 job search was legally adequate, the agency's delay in conducting the search was extreme and unexplained. RID at 9; *see Chen v. U.S. Postal Service*, [114 M.S.P.R. 292](#), ¶ 11 (2010). The results of that job search are insufficient to demonstrate that there was no work available for the appellant on April 9, 2009, and therefore they provide no basis for determining the measure of restitution to which the appellant may be entitled.

job search. In such circumstances, we ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If the agency's retroactive job search uncovers any suitable assignments and there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date on which it completes its job search.

¶13 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

¶14 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182](#)(a).

¶15 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. In the event the appellant is entitled to back pay, as set forth above, the agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439


The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.caafc.uscourts.gov. Of particular relevance is the court's

“Guide for Pro Se Petitioners and Appellants,” which is contained within the court’s Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

	<p style="text-align: center;">DFAS CHECKLIST</p> <p style="text-align: center;">INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD</p>
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AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

**CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL
OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:**

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.